SANITARY LEGISLATION.

COURT DECISIONS.

CALIFORNIA SUPREME COURT.

Itinerant Vendors of Drugs—Law Levying Tax and Requiring License Held Valid.

Ex parte GILSTRAP, 152 Pac. Rep., 42. (Sept. 30, 1915.)

A law requiring each itinerant vendor of drugs to secure a license and pay a semiannual tax of $100 held by the court to be a valid exercise of the police power of the State and not in conflict with the Federal Constitution.

LAWLOR, J.: * * * The amended petition [for habeas corpus] sets forth that upon a complaint sworn to by S. F. Scott, inspector of the California State Board of Pharmacy and filed in the justice's court of Modesto Township, county of Stanislaus, petitioner was arrested, tried, and convicted and sentenced to pay a fine of $100, with alternative imprisonment in the county jail at the rate of one day for every dollar of said fine remaining unpaid, and the costs of said action, for the offense of misdemeanor, to wit, carrying on and conducting as an itinerant vendor the business of selling drugs without previously obtaining a license therefor. (Stats. 1903, p. 284; Stats. 1907, p. 765; Stats. 1909, p. 419.) * * * Upon his failure and refusal to pay the fine imposed the petitioner was taken into custody by Arthur S. Dingley, sheriff of the said county, and the respondent herein, whose return sets forth the commitment on which the petitioner is held, and avers that petitioner was in such custody when he applied for the writ.

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(1) It is claimed by the petitioner that * * * the levying [of the license tax] is void, in that it is in violation of section 1 of the fourteenth amendment of the Constitution of the United States, in these particulars: (*a*) It abridges the privileges and immunities of citizens of the United States; and (*b*) it deprives them of liberty and property without due process of law.

We will first examine the legislation: The original act prescribing a license tax for itinerant vendors of drugs was passed in 1903. (Stats. 1903, p. 284.) Section 2 was amended in 1907 (Stats. 1907, p. 765) and section 1 in 1909 (Stats. 1909, p. 419).

Section 1 of the act as amended reads in part:

No person as principal or agent shall conduct as an itinerant vendor the business of selling or in any manner disposing of drugs * * * within this State without previously obtaining a license therefor as herein provided.

* * * * * * *

Section 2, as amended in 1907 * * * reads in part:

A license fee of $100 is hereby levied upon all such itinerant vendors doing business in this State. Said tax shall be paid to the State board of pharmacy, for the use and benefit of the State of California, and shall constitute a special fund for the enforcement of this act and of the provisions of the act or acts creating such board of pharmacy. Upon the receipt of said sum from any persons desiring to conduct such business within this State, the secretary of said board of pharmacy shall issue a license to such person to carry on such business within this State for the term of six months next ensuing: *Provided*, that nothing in this act shall be construed to prevent the collection of any tax or license that may be imposed by any county or municipal authority. * * *

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Section 3 provides that:

> Itinerant vendors under the meaning of this act shall include all persons who carry on the business above described by passing from house to house, or by haranguing the people on the public streets or in public places, or use the various customary devices for attracting crowds and therewith recommending their wares, and offering them for sale.
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The definition of an "itinerant vendor" as found in section 3 of the act, is broad enough to include hawkers and peddlers. (Standard Dictionary; Pegues *v.* Ray, 50 La. Ann., 574, 23 South., 904, 905; Andrews *v.* White, 32 Me., 388, 389; note to Hager *v.* Walker, 129 Am. St. Rep., 276; 25 Cent. Dig., 1114–1116; Emert *v.* Missouri, 156 U. S., 296–306, 15 Sup. Ct., 367, 39 L. Ed., 430, 5 Interest. Com. Rep., 68; Baccus *v.* Louisiana, 232 U. S., 334–338, 34 Sup. Ct., 439, 58 L. Ed., 627; and 21 Cyc., p. 370.)

Is such legislation violative of the fourteenth amendment of the Constitution of the United States? The petitioner claims that:

> It is not a police regulation, but a mere trade or commercial regulation, and not within the power of the legislature to enact.

It is well established that the fourteenth amendment of the Federal Constitution was not designed to interfere with the reasonable exercise of the police power in the several States. In Barbier *v.* Connolly (113 U. S., 29, 31, 5 Sup. Ct., 357, 358, 28 L. Ed., 923), passing on the constitutionality of a laundry ordinance of the city and county of San Francisco, it is said:

> In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We can not pass upon the conformity of that section with the requirements of the constitution of the State. * * * The fourteenth amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.

Powell *v.* Pennsylvania, 127 U. S., 683, 8 Sup. Ct., 992, 1257, 32 L. Ed., 253; Mugler *v.* Kansas, 123 U. S., 623, 8 Sup. Ct., 273, 31 L. Ed., 205; Butchers' Union Co. *v.* Crescent City Co., 111 U. S., 746–751, 4 Sup. Ct., 652, 28 L. Ed., 585; Yick Wo *v.* Hopkins, 118 U. S., 356, 6 Sup. Ct., 1064, 30 L. Ed., 220; Minn. Ry. Co. *v.* Beckwith, 129 U. S., 28, 33, 9 Sup. Ct., 207, 32 L. Ed., 586; Giozza *v.* Tiernan, 148 U. S., 662, 13 Sup. Ct., 721, 37 L. Ed., 599; *In re* Kemmler, 136 U. S., 436, 10 Sup. Ct., 930, 34 L. Ed., 519; Davis *v.* Mass., 167 U. S., 47, 17 Sup. Ct., 731, 42 L. Ed., 71; Jones *v.* Brim, 165 U. S., 180, 182, 17 Sup. Ct., 282, 41 L. Ed., 677; Missouri Pacific Railway Co. *v.* Humes, 115 U. S., 512, 519, 6 Sup. Ct., 110, 29 L. Ed., 463; *In re* Rahrer, 140 U. S., 554, 11 Sup. Ct., 865, 35 L. Ed., 572.

There is nothing in any of the authorities cited by the petitioner to the contrary of this doctrine. Applying the foregoing authorities to the case here, the recent cases of Emert *v.* Missouri, supra, and Baccus *v.* Louisiana, supra, seem to us conclusive on the question of the constitutionality of the legislation under the fourteenth amendment. Emert *v.* Missouri upheld a statute of the State of Missouri requiring the payment of a license tax by itinerant peddlers. The legislation was declared not to be repugnant to the grant by the Federal Constitution to Congress of the power to regulate commerce among the several States. The case cites many authorities on the general subject with reference to the fourteenth amendment of the Federal Constitution, and holds that such legislation is a valid exercise of the power of the State over persons and business within its borders.

Baccus *v.* Louisiana sustained a statute of the State of Louisiana, passed in 1894 (Act No. 49 of 1894, sec. 12), prohibiting the sale of drugs by itinerant vendors or peddlers, in the following language (232 U. S., 337, 34 Sup. Ct., 440, 58 L. Ed., 627):

* * * Thus, considering the case in its true aspect, the single issue to be decided is: Did the State have power, without violating the equal protection or due process of law clause of the fourteenth amendment, to forbid the sale by itinerant vendors of "any drug, nostrum, ointment, or application of any kind intended for the treatment of disease or injury," although allowing the sale of such articles by other persons? That it did have such authority is so clearly the result of a previous ruling of this court (Emert *v.* Missouri, 156 U. S., 296 [306, 307, 15 Sup. Ct., 367, 39 L. Ed., 430]), or at all events is so persuasively made manifest by the authorities cited and the reasoning which sustained the ruling of the court in the case just stated, as to leave no room for controversy on the subject. Moreover, the power which the State government possessed to classify and regulate itinerant vendors or peddlers exerted in the statute under consideration is cumulatively sustained and made, if possible, more obviously lawful by the fact that the regulation in question deals with the selling by itinerant vendors or peddlers of drugs or medicinal compounds, objects plainly within the power of Government to regulate.

In the opening brief of the petitioner section 3 of article 1 of the constitution of this State is cited to the proposition that the Constitution of the United States is the supreme law of the land, which is undoubtedly true "as to all matters provided for therein, * * * whether so recognized or not * * *" (People *v.* Nolan, 144 Cal., 75, 77 Pac., 774), and authorities are then cited to the point that a statute may be rendered invalid either by the express or implied terms of the Federal Constitution.

But it is manifest from the foregoing authorities that the levying of a license tax by the State for the purpose of regulating the business of selling drugs by itinerant vendors is not repugnant to the fourteenth amendment or to the Constitution of the United States as a whole.

(2) The next question is: Does the legislation constitute a valid exercise of the police power of the State apart from the Federal guaranties?

The constitutional limitations of the power to impose license or occupation taxes is discussed at length and many authorities are collated in a note to Hager *v.* Walker, 129 Am. St. Rep., 249 (128 Ky., 1, 107 S. W., 254, 15 L. R. A. [N. S.] 195), wherein an occupation tax on real estate agents was declared unconstitutional. Under the head of "Mercantile pursuits," the right to impose a license tax on the occupation of vending milk, meats, weapons and ammunition, tobacco, and the like is supported. Upon the subject of licensing the occupation of hawkers and peddlers (par. 7) it is said:

The occupation of hawkers and peddlers is one which from early times has been deemed a proper subject for special legislative control and restriction, particularly in cities. The primary purpose for regulating this occupation should be to protect the public from imposition from dishonest traders. It is probable, however, that most regulations find their impulse in the demands of established shopkeepers for protection from competition with hawkers and peddlers. So that it may be said that the purpose of regulating the occupation of peddling is to protect, on the one hand, fair traders, especially established storekeepers residing permanently in cities and towns and there paying rent and taxes for the local privilege, from being undersold by itinerant persons, and, on the other hand, to guard the public from fraud and imposition not infrequently practiced by such traders who have no known residence or responsibility. (State *v.* Cederaski, 80 Conn., 478, 69 Atl., 19; State *v.* Looney, 214 Mo., 216, 97 S. W., 934, 99 S. W., 1165, 29 L. R. A. (N. S.), 412; Saulsbury *v.* State, 43 Tex. Cr. R., 90, 63 S. W., 568, 96 Am. St. Rep., 837.)

* * * That persons who desire to peddle may be required to obtain a license and pay a fee therefor, or may be required to pay a tax for the privilege of following their occupation, is attested by numerous recent decisions. * * * Such regulation and taxation are valid, unless made impartial, unreasonable, oppressive, or discriminatory. * * * There is no doubt, as the authorities in the preceding paragraph all recognize, that hawkers and peddlers may be placed in a class by themselves for license purposes. (129 Am. St. Rep., p. 276.)

See 25 Cent. Dig., pp. 1113–1123; 21 Cyc., p. 364; and 15 Am. & Eng. Ency. of Law, pp. 290–303.

It is clear that the license tax is a general law, enforceable in every part of the State, regulating "the business of selling or in any manner disposing of drugs * * * within this State" by "itinerant vendors," as that term is defined in section 3 of the act. That it is a general law of the State is shown by the language "within this State," in section 1, and "itinerant vendors doing business in this State," in section 2

of the act; that the license tax must be paid to the State board of pharmacy "for the use and benefit of the State of California;" that it shall constitute a special fund for the enforcement of this act, and of the provisions of the act or acts creating such board of pharmacy; and that an annual statement is required to be filed by such board with the controller of the State. The charge, it is to be noted, was brought by an inspector of the State board of pharmacy.

On the subject of the police power, it was said by Mr. Justice Sloss, in County of Plumas *v.* Wheeler (149 Cal., 762, 87 Pac., 910), which declares constitutional a county ordinance fixing a license fee on the business of raising, herding, grazing, and pasturing sheep and lambs within the county.

> The principles affecting the right of legislative bodies, in the exercise of what is known as the "police power," to place restrictions upon the conduct of lawful pursuits and occupations, are well settled, although there is often great difficulty in applying these principles to a given state of facts. It is within the legislative discretion to place such restrictions upon the use of any property or the conduct of any business as may be reasonably necessary for the public safety, comfort, or health. "The police power, the power to make laws to secure the comfort, convenience, peace, and health of the community, is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested." (*Ex parte* Whitwell, 98 Cal., 73, 32 Pac., 879 [19 L. R. A., 727] 35 Am. St. Rep., 152.) "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." (Commonwealth *v.* Alger, 7 Cush. [Mass.] 53.) * * * The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the legislature has, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation. But the legislative determination is not conclusive."

We think that the legislation is well within the police power of the State. The subject matter is one "which from early times has been deemed a proper subject for special legislative control and restriction." Hager *v.* Walker, supra. The amount of the license tax can not be said to be "oppressive or discriminatory." (County of Plumas *v.* Wheeler, 149 Cal., 763, 87 Pac., 909; *In re* Miller, 13 Cal. App., 567, 110 Pac., 139.) The law applies uniformly upon the whole of a single class of clearly defined individuals, and the classification is founded upon a natural, intrinsic, and constitutional distinction. (*Ex parte* Koser, 60 Cal., 177; Abeel *v.* Clark, 84 Cal., 226, 24 Pac., 383; Cody *v.* Murphey, 89 Cal., 522, 26 Pac., 1081; Foster *v.* Police Commissioners, 102 Cal., 483, 37 Pac., 763, 41 Am. St. Rep., 194; People *v.* Central Pac. R. R. Co., 105 Cal., 576, 38 Pac., 905; Murphy *v.* Pacific Bank, 119 Cal., 334, 51 Pac., 317; Rode *v.* Siebe, 119 Cal., 518, 51 Pac., 869, 39 L. R. A., 342; Vail *v.* San Diego, 126 Cal., 35, 58 Pac., 392; Murphy *v.* Pacific Bank, 130 Cal., 542, 62 Pac., 1059; Ruperich *v.* Baehr, 142 Cal., 190, 74 Pac., 782; Kaiser Land & Fruit Co. *v.* Curry, 155 Cal., 638, 103 Pac., 341; Lewis *v.* Curry, 156 Cal., 93, 103 Pac., 493; and Matter of Yun Quong, 159 Cal., 508, 114 Pac., 835, Ann. Cas., 1912C, 969.) And it is plain that the legislature only intended to regulate the business of selling drugs by itinerant vendors within the limits of the police power of the State, and did not assume to exercise the power of taxation for the purposes of revenue.

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Writ discharged, and petitioner remanded.

We concur: SLOSS, *J.*; LORIGAN, *J.*

SHAW, *J.* (concurring): I see nothing in this case requiring elaborate statement, prolonged discussion, or the citation of many authorities. Assuming that the law in controversy is an exercise of the police power, and not of the power of taxation, the questions presented have long been settled by numerous decisions and are comparatively simple and easy of solution. Upon that hypothesis the decisions in Baccus *v.* Louisiana (232 U. S., 337, 34 Sup. Ct., 439, 58 L. Ed., 627), *Ex parte* Campbell (74 Cal., 20, 15 Pac., 318, 5 Am. St. Rep., 418), and *Ex parte* Coombs (169 Cal., —, 147 Pac., 131), establish the proposition that a law regulating a business which, if unrestricted, may be injurious to the public health or safety, violates neither the State nor the United States Constitutions.

If, however, the act is not a police regulation, but an act imposing a tax for revenue, it might, perhaps, be plausibly urged that a law imposing an occupation tax solely upon itinerant drug peddlers, leaving all other peddlers and all other mercantile pursuits free from such taxes, would be an improper discrimination against one class of peddlers, on the ground that there is no just basis for the classification. The petitioner argues that it is a revenue tax, and that it arbitrarily places an unequal burden upon a class. Justice Lawlor has not discussed this objection. The terms of the act and of the pharmacist act to which it refers satisfactorily show that it was enacted for the purpose of regulation, and not for revenue. The charge is denominated "a license fee." It is required to be paid to the State board of pharmacy for use in enforcing this act and the pharmacist act also. The latter creates a State board of pharmacy and regulates the business of selling drugs and compounding prescriptions in this State, being undoubtedly a police measure. The two acts are therefore supplementary to each other, and together constitute the legislative plan for regulating the entire business of selling drugs, nostrums, and ointments. The legislative conclusion that the fees received from the peddlers should be added to the fees paid under the pharmacist act, and the whole devoted to the use of carrying out and enforcing the general plan, is a legitimate exercise of its discretion to apportion and apply the fund, in view of the fact that the two laws are to be regarded as one covering the entire subject. This indicates the intent to regulate rather than to tax. The law comes within the rule thus stated in Plumas *v.* Wheeler (149 Cal., 763, 87 Pac., 911).

It is also well settled that the power to regulate a business may be exercised by means of a license fee or charge. The amount of the license fee, however, must not be more than is reasonably necessary for the purpose sought, i. e., the regulation of business.

The legislative judgment as to the amount is conclusive, unless it clearly appears to be wrong. In view of the uses to which the license fees are to be devoted, we can not say it exceeds the amount reasonably necessary.

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I believe that the law in question is valid, and I concur in the judgment that the petitioner be remanded.

We concur: SLOSS, *J.*; MELVIN, *J.*

ANGELLOTTI, *C. J.*: I concur in the judgment, and generally in the views expressed in the opinion of Justice Lawlor. That the act involved was intended solely as a regulatory measure designed to regulate the business of selling "drugs, nostrums, ointments, or any appliances for the treatment of diseases, deformities, or injuries" by "itinerant vendors" is very clear to me. I am also satisfied that it can not be held, as matter of law, that the legislative judgment as to the amount of fee or charge reasonably necessary for the regulation of that business, viz, $100 for each half year, is wrong.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Industrial Diseases—Pneumonia Induced by Exposure in the Course of Employment is Within the Terms of the Massachusetts Workmen's Compensation Act.

In re McPHEE. In re LONDON GUARANTEE & ACCIDENT CO., 109 N. E. Rep., 633. (Sept. 16, 1915.)

The inhalation of damp smoke and drenching with water, resulting in lobar pneumonia, is a "personal injury" within the meaning of that term as used in the Massachusetts workmen's compensation law.

A person who was dependent upon an employee of an amusement company presented a claim under the Massachusetts workmen's compensation act for the death of the employee. From the evidence presented the arbitration committee found that the employee, while assisting in extinguishing a fire which threatened his employer's property, "had been drenched with water and saturated with smoke; the personal injury thus incurred had begun its invasion of his system, ultimately causing lobar pneumonia and death in an unbroken chain of causation with said personal injury."